Testimony
Senate Committee on the Judiciary

Senate Bill 589
Transfer of Risk in Construction Contracts
March 23, 2010

Jeffrey J. Beiriger
Government Relations Advisory
Cook & Franke, SC
(Milwaukee, WI)

On Behalf Of
American Subcontractors Association of Wisconsin

Good morning. My name is Jeffrey J. Beiriger and I am a Government Relations Advisor for Cook & Franke, SC (Milwaukee), a full-service law firm. In addition to my lobbying work, I also serve as the executive director for several trade and professional associations, including the American Subcontractors Association and several other who have registered and/or testified in support of Senate Bill 589. I come here to do the same – to testify in SUPPORT of the bill.

I would point out that in addition to my other responsibilities, I have also served as a management member of the Workers Compensation Advisory Council. The Council provides advice both to the Department of Workforce Development and to the state legislature.

It's hard for me to believe that it has been more than fifteen years that I have served on that Council. In our service, we are constantly reminded of the "great compromise" that is the foundation of our Worker's Compensation statute – among the first such statutes in the nation.

The "great compromise" was this – that in exchange for protection from being sued in tort by its employees, management would agree to a no-fault system of providing medical care and loss-of-work benefits to injured workers. We can argue about the nature of the benefits that are provided, but in all circumstances, those benefits are provided. But what of the protection from being sued? What of the so-called "exclusive remedy" protection under Chapter 102 of our statutes?

While it is true that you cannot sue the employer, risk transfer language that we find in today's construction agreements is effectively circumventing that statute. The employee of a subcontractor is injured and exercises their right to sue the owner and other contractors for damages.

We do not testify here to prevent that employee from filing such a suit. Others are better able to articulate the reasons why or why not with regard to such actions. We do, however, come before you and ask that we address the transfer of risk to the employer of the injured worker and to stop the practice of transfer risk in its entirety.

This is seemingly a complex issue, with a language all its own – indemnitor, indemnitee, subrogation – but the concept is fairly simple. Each of us should be responsible for the damages we cause on a construction project. If it is insurable risk to one, it is in insurable risk to all.

In doing so, we believe that we are restoring the legislative intent of the language in Chapter 895 – the language that the Supreme Court interpreted differently than was intended in its *Gerdmann v U.S. Fire Insurance Company* decision – and we are restoring the intent of Chapter 102 that deals with Worker's Compensation and the exclusive remedy provision.

All of our groups believe that parties should be able to freely contract among themselves – but there are a couple of points on that. First, there is a long history of government regulation in private contracts. Second, that history is borne out of the necessity of balancing the relative positions between the parties to the contracts. Third, there is a public policy exception to private contracts that must be honored – where no two parties are allowed to contract for something that is otherwise against public policy. To circumvent the Worker's Compensation statute is, in my mind, exactly that and all of these vehicles by which it is circumvented should be voided as being against public policy.

I appreciate the opportunity to testify today and thank you, Senator Taylor, for introducing this important piece of legislation. There are more than 1,100 plumbing contractors in the state. More than 800 roofing contractors. More than 1,000 heating-cooling contractors. Nearly 1,000 electrical contractors. But despite these numbers, subcontractors are not able to bargain on a level playing field with their customers – not on this issue.

Subcontractors are very definition of small, privately-held businesses in every community throughout Wisconsin. As a group, they will compete on the basis of quality, price, speed of service, reputation, and more. It's time to stop having them compete on the basis of their willingness to accept the risk of those they do business with. It's time to have every party accept its own risk and I ask you to support SB 589.

If you have any questions, I will be happy to answer them.

The Daily Reporter **http://dailyreporter.com**

Truck driver injured in accident sues general

by admin

Published: February 23rd, 2006

A truck driver who had 2,400 pounds of tile fall on him while making a delivery has sued The Bentley Company, alleging the company was responsible for the accident.

Borivoj Karan, of Milwaukee, was delivering a pallet of tile in January 2002 to Holy Angels Catholic Church in West Bend for Lippert Tile Co. Inc. of Menomonee Falls when it fell from the back of the truck onto him.

At the time of the incident, Holy Angels was undergoing a renovation project in which The Bentley Company, Milwaukee, was the general contractor and Lippert Tile was a subcontractor.

"As soon as I noticed it moving, I put my hands up against it," said Karan in the suit, filed in Milwaukee Circuit Court. "The lift gate normally bends a little bit when the weight shifts. I was trying to hold the pallet, and it was pushing me. That's when I slipped. I fell only a split second before the weight came down."

Bentley motioned for summary judgment in the case in December, and Karan's attorney, Gonzalez, Saggio & Harlan LLP, filed a brief opposing summary judgment on Feb. 1. The court has yet to rule, and responsibility for both the cause of injury and the safety conditions at the accident site are in dispute.

Snowy parking lot

According to the suit, Karan says he and Lippert co-worker Tony Ford were trying to move the pallet of tile from the back of the truck to the truck's lift gate when the pallet started to fall. Karan took a step or two to get out of the way but slipped in the snow-covered parking lot and fell to the ground. The materials then landed on Karan.

According to Ford, who assisted Karan with the delivery, he was told where to place the tile under an overhang by the Bentley job superintendent. Ford then directed Karan to park the truck close to that overhang. Ford said he and Karan were trying to get the pallet all the way onto the lift gate so it could be lowered when the pallet started sliding off the gate. He yelled to Karan to move, but Karan slipped and the tile fell on him.

Karan said that he had seen pallets fall before but always had time to get out of the way. This time, however, he slipped on the wet pavement.

In the suit, Bentley Job Superintendent Richard Awve denied talking to either Karan or Ford before they made their delivery and instructing Ford to deliver near the overhang.

Karan's attorneys contend that as the general contractor in control of the project, it was Bentley's responsibility to make sure the area was safe for deliveries.

In asking for a summary judgment, Bentley denied responsibility for the accident, arguing that Holy Angels was responsible for clearing the parking lot, that Karan and Ford chose to park and unload the truck in an unsafe place, and that Karan disregarded the safety training he received from Lippert by standing behind the lift gate instead of to the side of it.

Lippert Tile warehouse manager and Karan's supervisor, Michael Scartino, testified that Karan and Ford should have broken down the pallet before trying to move it and that Karan should not have been standing behind the lift gate. He also said that Lippert employees are responsible for their own safety when it comes to where to unload and that Bentley had no right to control how Karan and Ford did their jobs.

Karan claimed he was not told by Lippert it was safer to break the pallet down than move the whole thing.

According to The Bentley Company's response, it said it could not be held responsible because the parking lot in which the fall took place was not a place of employment for Bentley, Bentley exercised no supervision or control over Karan and Ford, and that the conditions were not unsafe enough to impose a duty upon Bentley to maintain the lot. Therefore, Bentley claimed, the responsibility of the accident did not lie with the company.

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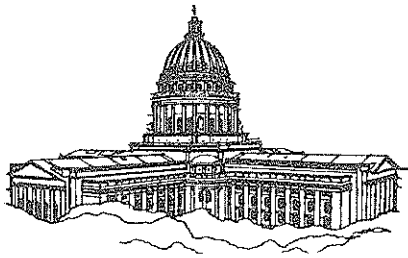

LENA C. TAYLOR

Wisconsin State Senator • 4th District

HERE TO SERVE YOU!

Testimony of Senator Lena C Taylor

SB 589 – Indemnity Clauses in Construction Contracts

Committee on Judiciary, Corrections, Insurance, Campaign Finance Reform, & Housing

Tuesday, March 23, 2010

Honorable Members of the Committee:

Thank you for taking testimony today on SB 589 which prohibits indemnity clauses in construction contracts otherwise known as "risk transfer". In the construction industry, the *transfer* of risk is common in contracts, particularly when one party – typically an owner or a general contractor - has a superior bargaining position to others – typically a subcontractor. Transfer of risk violates a fundamental principle of fairness. Instead of a system where - "You break it, you bought it" – is the rule of order, it becomes - "I broke it, *you* bought it."

As an example -- a "big box" store can make a small subcontractor responsible for a claim by transferring risk in its contract -- even if the subcontractor didn't create the hazard causing the accident. For example, an electrician is working on a ladder (with all of the proper safety procedures being followed) when the ladder is undermined by an employee of the "big box" store. When the employee sues the "big box" owner, that owner transfers the cost of defending the claim and any judgment back to the subcontractor – effectively insulating them from liability.

It would be easy to suggest that subcontractors should avoid signing such agreements, but they are pervasive in the industry and the subcontractor has no leverage to negotiate such clauses out of their agreements. That's why a legislative solution is necessary. There are, throughout our statues, similar concepts – where the legislature will even the playing field in which one party would otherwise be forced to accept unfavorable terms (landlord/tenant laws, for instance). Unable to avoid or negotiate these clauses, subcontractors are faced with difficult choices, additional expenses, and a burden of risk – <u>someone else's risk</u> – that can only be addressed by changing the law.

Across the nation, there are nearly 40 states that have some form of limits on risk transfer provision and most recently, Colorado, Georgia, and Oklahoma passed legislation that addresses this issue. Wisconsin is doing the same in SB 589 which would prohibit this transfer of risk. I encourage your support of this legislation.

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Committee on Justice Reinvestment Initiative Oversight (Chair)

Joint Committee on Finance
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Senate Bill 589- Indemnification Limits

Testimony by Jim Boullion, Director of Government Affairs

March 23, 2010

Associated General Contractors of Wisconsin is opposed to passage of SB 589. This bill would prohibit the use of contract provisions that allow a contractor or subcontractor to indemnify an owner or general contractor from liability arising out of that contractors or subcontractors work.

As general contractors, our members face numerous risks that are inherent on every construction project, some in our control, and others out of our control. To reduce the risks we have control of, our members are constantly working on improving their safety policies and programs. This is a high priority, not only for the safety of our employees, because it also helps reduce insurance and workers compensation costs.

However, the most common risk that occurs on a jobsite is when a subcontractor's employee is hurt. This is one of the risks that are out of our control. Indemnification provisions pre-allocate this risk to those who are in the best position to control that risk.

Trial attorneys know that they cannot get a settlement directly from the worker's employer because the Workers Compensation law prohibits it. So they look around the jobsite to find anyone who was present that they can find even slightly at fault in the eyes of a jury.

Because general contractors have a presumption of keeping the entire worksite safe at all times, they are an easy target. Whether they were actively at fault does not matter, because they can be found liable for "passive negligence" in just about any injury case. Here are just three real world examples of passive negligence:

1. Failure to discover a defective condition created by others.
2. Failure to exercise a right to inspect certain work and specify changes.
3. Failure to exercise a supervisory right to order removal of defective material.

The subcontractor, not the general contractor, is the one who directly supervises, trains and is responsible for the safety of their employees on a day to day basis. By requiring the subcontractor to take out insurance to protect the general contractor for claims that arise out of that subcontractors work, you are putting the risk and liability with the entity that is in the best position to prevent the injury and claim in the first place.

Other issues that are involved:

1. Freedom to Contract – This proposal would prohibit people from entering into a mutually agreed to contract provision. The State should not take away a tool that the private sector currently has available to allocate risk to the entities that are best able to control it.

2. Reduce Safety – Subcontractors are currently protected from injury and death lawsuits to their employees by the workers compensation law. Without hold harmless provisions, general contractors loose a tool to encourage subcontractors to use safe practices.

3. Other States - Very few states prohibit any indemnification clauses in construction contracts. SB 589 would put Wisconsin into this very restrictive category of states and would be unfair to owners and general contractors who are at a much higher risk for lawsuits than individual subcontractors.

In summary, it is the subcontractor, not the general contractor is the one who directly supervises, trains and is responsible for the safety of their employees on a day to day basis. By requiring the subcontractor to take out insurance to protect the general contractor for claims that arise out of that subcontractors work, you are putting the risk and liability with the entity that is in the best position to prevent the injury and claim in the first place.

Please oppose SB 589.

Thank you for your time.

Testimony
Senate Committee on the Judiciary

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Transfer of Risk in Construction Contracts
March 23, 2010

April Weatherston
HNI Risk Services, Inc.
(New Berlin, WI)

Good morning and thank you for the opportunity to meet with you. My name is April Weatherston. I am employed by HNI Risk Services, Inc., an insurance broker and risk advisor located in New Berlin, WI. I have the position of Account Executive in our Construction Niche.

As the Account Executive within the Service Team, it is my responsibility to develop insurance programs that are client specific, making certain to fill coverage gaps and to establish "contractual risk transfer" procedures as a fundamental part of the Project Management function. My area of responsibility also includes the development, management and implementation of a strategic plan that focuses on reducing the total cost of risk for our clients.

Our process allows us to develop a "Game Plan" that is truly customer specific. This could include safety training, jobsite visits, educational seminars, OSHA compliance, leadership training or corporate cultural development. Ultimately our goal is to develop a plan that has the flexibility to consistently meet the needs of the client in an often unpredictable environment - the business of construction.

HNI Risk Services, Inc. holds memberships in a number of trade associations, including the National Roofing Contractors Assoc., Wisconsin Roofing Contractors Assoc., Wisconsin Ready Mix Contractors Assoc., Metro Builders Assoc., American Subcontractors Association, the Association of General Contractors along with membership in the Professional Insurance Agents Association. I am an active member in the National Association of Women in Construction, currently serving on the board and as the Regional 2010 Spring Forum Chair. Please note that I am not here representing any of these associations; rather I am here in support of my client and the struggles that many of my clients face every day.

Others have testified regarding "risk transfer" and how it is accomplished in a construction contract. Unfortunately for my clients, this is nothing new and

has become a way of life, a part of project management. When I am called upon to review a construction contract, my focus is on the indemnification language and insurance compliance. I begin with the indemnification language because it's important to identify the form (broad, intermediate or limited) as it correlates to the insurance requirements. Remember that indemnification language is the part of the contract that shifts the responsibility from one party to another. How much of that shift in responsibility, as well as how the insurance policy responds for compliance purposes is (or should be) determined by the form.

Every business owner purchases insurance (just like most of us purchase coverage for our auto and home) to protect their business. They typically purchase a Package Policy that covers all aspects of the business (liability, property, inland marine) plus auto, workers compensation and umbrella liability. The business owner often makes an assumption that no matter what, if something "bad" happens, they're going to be covered. Unfortunately, this isn't always the case. Now back to the "risk transfer" piece - within the insurance requirements of a construction contract (the part that says how much insurance coverage you will provide, what endorsements are necessary and

what language is acceptable), the general contractor, property owner or developer will specifically spell out what is required. Proof of Insurance will almost always be required before the subcontractor is allowed on the job.

The challenge begins - to make sure that we have acceptable limits of liability in place and that we provide the appropriate endorsements including Additional Insured status, Per Project Aggregate, Primary and Non-Contributory language, Waivers of Subrogation in favor of "all" Additional Insureds, and Notice of Cancellation of at least 30 days (sometimes more). There are a myriad of endorsement types that can be used to satisfy the ever-changing requirements in construction contracts. For the agent not well-versed in the business of insurance, this could be a nightmare. For those of us that work with construction clients day in and day out, we at the very least, have done our best to educate ourselves and our clients so that they are armed with the knowledge and the tools to push back and negotiate potentially dangerous terms. And no matter what side of the fence we are on, all agents and brokers expose themselves to substantial Errors & Omissions claims if they make a mistake - some of which have the potential to put "our owners" out of business. As you can see from my list, the variety of insurance forms and enhancements

are enough to confuse the average insurance agent, let alone the average insurance buyer/user.

Moreover, the amount of work it takes and the potential for underinsured contractors, the extension of liability a subcontractor assumes is quite onerous. By providing Additional Insured status on General Liability policies, the subcontractor's liability is potentially endless. General Liability coverage is meant to protect the Contractor/Subcontractor for their own negligence - bodily injury and/or property damage resulting from their work. That's how it's rated.

In the case of Lippert Tile, my underwriter needed background information on the business including what they do and how they do it, how safely they perform their work and the quality of their workmanship.

Endorsements are then added to the policy to broaden the amount of coverage provided to others because of a contractual agreement. The Additional Insured endorsement falls into this category. Thus, this is the beginning of a subcontractor's indefinite assumption of another's liability. It would be nearly impossible for an underwriter to assess the risk of the entire project, however, the Additional Insured form can often provide coverage in one

single subcontractor's policy. Therefore, an electrical contractor could potentially assume 100 percent of the project's liability but only perform a fraction of the work. Fair? Equitable? How will losses incurred as a result of assuming the risk of others impact my ability to place proper insurance protection year after year?

My intent was to cover the basics of risk transfer from the perspective of the insurance broker. Now here's a real life scenario - from MSI General. A review of the Certificate requirements identify the provision for sole negligence by way of endorsement to the General Liability policy but is contrary to indemnification language. In addition, they require that the subcontractor "will" carry Completed Operations insurance for ten (10) years or the length of the statute of limitations, whichever is later. They also require the subcontractor to name MSI General Corporation as an Additional Insured on a primary basis on "your" Commercial General Liability insurance for ten (10) years or the length of the statute of limitations whichever is later. It is impossible for me to know whether my client, the Subcontractor, will be in business ten years from now let alone be willing to maintain the appropriate coverage as required by this contract. Unfortunately, for my clients, this isn't the only contract that has

unreasonable requirements. Very often we see inconsistencies between indemnification language and the insurance requirements - which lends for even more confusion. It is now becoming the trend as opposed to the occasion.

You will no doubt hear about Workers Compensation issues. Third Party / Action-Over Claims are on the rise. In Wisconsin, it has always been my understanding that Workers Compensation was intended to be the exclusive remedy for work-related injuries. The Additional Insured status has placed a loop-hole in the system, allowing for the payment of pain and suffering claims to be ultimately paid by the employee's own employer. We (HNI) have a current claim situation where an injured worker filed claim not only against Workers Compensation but against the General Contractor and Building Owner because of an unsafe condition. He fell two stories through a skylight, survived, and as of my last review, the claim value against my Subcontractor's General Liability policy is at $1,800,000. Because the Building Owner and General Contractor transferred their risk to our client, Worker's Compensation was hardly the exclusive remedy against the employer that it was meant to be.

CG 00 01 12 07-Commercial General Liability Coverage Form
CG 00 02 12 07-Commercial General Liability Coverage Form
CG 00 09 12 07-Owners & Contractors Protective Liability Coverage Form
CG 00 33 12 07-Liquor Liability Coverage Form
CG 00 34 12 07-Liquor Liability Coverage Form
CG 00 35 12 07-Railroad Protective Liability Coverage Form
CG 00 37 12 07-Products/Completed Operations Liability
CG 00 38 12 07-Products/Completed Operations Liability
CG 00 39 12 07-Pollution Liability Coverage Form-Designated Sites
CG 00 40 12 07-Pollution Liability Limited Coverage Form-Designated Sites
CG 00 42 12 04-Underground Storage Tank Policy Designated Tanks
CG 00 65 12 07-Electronic Data Liability Coverage Form
CG 00 66 12 07-Product Withdrawal Coverage Form
CG 00 68 05 09-Recording & Distribution of Material or Information in Violation of Law Exclusion
CG 00 99 11 85-Changes in General Liability Forms For Commercial Package Policies
CG 01 24 01 93-Wisconsin Changes-Amendment of Policy Conditions
CG 02 24 10 93-Earlier Notice of Cancellation Provided by Us
CG 03 00 01 96-Deductible Liability Insurance
CG 03 05 01 96-Deductible Liability Insurance
CG 04 22 11 85-Pollution Liability Coverage Extension
CG 04 24 10 93-Coverage For Injury to Leased Workers
CG 04 26 11 94-Coverage For Injury to Leased Workers
CG 04 28 12 04-Pollution Exclusion-Named Peril Limited Exception For a Short-Term Pollution Event
CG 04 29 12 04-Pollution Exclusion-Exception For a Short-Term Pollution Event
CG 04 30 09 99-Pollution Exclusion-Limited Exception For Designated Pollutants
CG 04 31 09 98-Year 2000 Computer-Related & Other Electronic Problems-Limited Coverage Options
CG 04 32 04 98-Year 2000 Computer-Related & Other Electronic Problems-Limited Coverage Options
CG 04 35 12 07-Employee Benefits Liability Coverage
CG 04 36 12 04-Limited Product Withdrawal Expense Endorsement
CG 04 37 12 04-Electronic Data Liability
CG 20 02 11 85-Additional Insured-Club Members
CG 20 03 11 85-Additional Insured-Concessionaires Trading Under Your Name
CG 20 04 11 85-Additional Insured-Condominium Unit Owners
CG 20 05 11 85-Additional Insured-Controlling Interest
CG 20 07 07 04-Additional Insured-Engineers, Architects, Surveyors
CG 20 08 11 85-Additional Insured-Users of Golfmobiles
CG 20 10 07 04-Additional Insured-Owners, Lessees or Contractors
CG 20 11 01 96-Additional Insured-Managers or Lessors of Premises
CG 20 12 05 09-Additional Insured-State or Governmental Agency or Subdivision or Political Subdivision-Permits or Authorizations
CG 20 13 05 09-Additional Insured-State or Governmental Agency or Subdivision or Political Subdivision-Permits or Authorizations Relating to Premises
CG 20 14 11 85-Additional Insured-Users of Teams, Draft or Saddle Animals
CG 20 15 07 04-Additional Insured-Vendors
CG 20 17 10 93-Additional Insured-Townhouse Associations
CG 20 18 11 85-Additional Insured-Mortgagee, Assignee, or Receiver
CG 20 20 11 85-Additional Insured-Charitable Institutions
CG 20 22 10 01-Additional Insured-Church Members & Officers

CG 20 23 10 93-Additional Insured-Executors, Administrators, Trustees or Beneficiaries
CG 20 24 11 85-Additional Insured-Owners or Other Interests From Whom Land Has Been Leased
CG 20 25 11 85-Additional Insured-Elective or Appointive Executive Officers of Public Corporations
CG 20 26 07 04-Additional Insured-Designated Person or Organization
CG 20 27 11 85-Additional Insured-Co-Owner of Insured Premises
CG 20 28 07 04-Additional Insured-Lessor of Leased Equipment
CG 20 29 11 85-Additional Insured-Grantor of Franchise
CG 20 30 01 96-Oil or Gas Operations
CG 20 31 07 04-Additional Insured-Engineers, Architects or Surveyors
CG 20 32 07 04-Additional Insured-Engineers, Architects or Surveyors Not Engaged by The Named Insured
CG 20 33 07 04-Additional Insured-Owners, Lessees or Contractors
CG 20 34 07 04-Additional Insured-Lessor of Leased Equipment
CG 20 35 10 01-Additional Insured-Grantor of Licenses-Automatic Status
CG 20 36 10 01-Additional Insured-Grantor of Licenses
CG 20 37 07 04-Additional Insured-Owners, Lessees or Contractors
CG 21 00 07 98-Exclusion-All Hazards in Connection With Designated Premises
CG 21 01 11 85-Exclusion-Athletic or Sports Participants
CG 21 04 11 85-Exclusion-Products-Completed Operations Hazard
CG 21 16 07 98-Exclusion-Designated Professional Services
CG 21 17 07 98-Exclusion-Movement of Buildings or Structures
CG 21 31 05 09-Limited Exclusion-Designated Operations Covered by a Consolidated (Wrap-Up) Insurance Program
CG 21 32 05 09-Communicable Disease Exclusion
CG 21 33 11 85-Exclusion-Designated Products
CG 21 34 01 87-Exclusion-Designated Work
CG 21 35 10 01-Exclusion-Coverage C-Medical Payments
CG 21 36 03 05-Exclusion-New Entities
CG 21 37 10 01-Exclusion-Employees & Volunteer Workers as Insureds
CG 21 38 11 85-Exclusion-Personal & Advertising Injury
CG 21 39 10 93-Contractual Liability Limitation
CG 21 41 11 85-Exclusion-Intercompany Product Suits
CG 21 42 12 04-Exclusion-Explosion, Collapse & Underground Property Damage Hazard-Specified Operations
CG 21 43 12 04-Exclusion-Explosion, Collapse & Underground Property Damage Hazard-Specified Operations Excepted
CG 21 44 07 98-Limitation of Coverage to Designated Premises or Project
CG 21 45 07 98-Exclusion-Damage to Premises Rented to You
CG 21 46 07 98-Abuse or Molestation Exclusion
CG 21 47 12 07-Employment-Related Practices Exclusion
CG 21 49 09 99-Total Pollution Exclusion Endorsement
CG 21 50 09 89-Amendment of Liquor Liability Exclusion
CG 21 51 09 89-Amendment of Liquor Liability Exclusion
CG 21 52 07 98-Exclusion-Financial Services
CG 21 53 01 96-Exclusion-Designated Ongoing Operations
CG 21 54 01 96-Exclusion-Designated Operations Covered by a Consolidated Insurance Program
CG 21 55 09 99-Total Pollution Exclusion With a Hostile Fire Exception
CG 21 56 07 98-Exclusion-Funeral Services
CG 21 57 07 98-Exclusion-Counseling Services
CG 21 58 07 98-Exclusion-Professional Veterinarian Services
CG 21 59 07 98-Exclusion-Diagnostic Testing Laboratories
CG 21 60 09 98-Exclusion-Year 2000 Computer-Related & Other Electronic Problems
CG 21 61 04 98-Exclusion-Year 2000 Computer-Related & Other Electronic Problems-Products/Completed Operations

CG 21 62 09 98-Exclusion-Year 2000 Computer-Related & Other Electronic Problems
CG 21 63 09 98-Exclusion-Year 2000 Computer-Related & Other Electronic Problems
CG 21 64 09 98-Exclusion-Year 2000 Computer-Related & Other Electronic Problems
CG 21 65 12 04-Total Pollution Exclusion With a Building Heating, Cooling & Dehumidifying Equipment Exception
CG 21 66 12 04-Exclusion-Volunteer Workers
CG 21 67 12 04-Fungi or Bacteria Exclusion
CG 21 70 01 08-Cap on Losses From Certified Acts of Terrorism
CG 21 71 06 08-Exclusion of Other Acts of Terrorism Committed Outside The United States; Cap on Losses From Certified Acts of Terrorism
CG 21 73 01 08-Exclusion of Certified Acts of Terrorism
CG 21 75 06 08-Exclusion of Certified Acts of Terrorism & Exclusion of Other Acts of Terrorism Committed Outside The United States
CG 21 76 01 08-Exclusion of Punitive Damages Related to a Certified Act of Terrorism
CG 21 77 11 02-Exception to Terrorism Exclusion For Certified Acts of Terrorism; Cap on Losses From Certified Acts of Terrorism
CG 21 78 11 02-Removal of Terrorism Exclusion; Cap on Losses From Certified Acts of Terrorism
CG 21 80 01 08-Certified Acts of Terrorism Aggregate Limit; Cap on Losses From Certified Acts of Terrorism
CG 21 82 01 08-Certified Acts of Terrorism Aggregate Limit; Cap on Losses From Certified Acts of Terrorism
CG 21 84 01 08-Exclusion of Certified Acts of Nuclear, Biological or Chemical Acts of Terrorism; Cap on Losses From Certified Acts of Terrorism
CG 21 86 12 04-Exclusion-Exterior Insulation & Finish Systems
CG 21 87 01 07-Conditional Exclusion of Terrorism
CG 21 88 01 07-Conditional Exclusion of Terrorism Involving Nuclear, Biological or Chemical Terrorism
CG 21 89 01 07-Conditional Limitation of Coverage For Terrorism on an Annual Aggregate Basis
CG 21 90 01 06-Exclusion of Terrorism
CG 21 91 01 06-Exclusion of Terrorism Involving Nuclear, Biological or Chemical Terrorism
CG 21 92 01 06-Limitation of Coverage For Terrorism on an Annual Aggregate Basis
CG 21 93 07 04-Extended Reporting Period For Terrorism Coverage
CG 21 96 03 05-Silica or Silica-Related Dust Exclusion
CG 21 97 12 07-Abuse or Molestation Exclusion-Specified Professional Services
CG 21 98 12 07-Total Pollution Exclusion Endorsement
CG 22 24 07 98-Exclusion-Inspection, Appraisal & Survey Companies
CG 22 27 11 85-Exclusion-Bodily Injury to Railroad Passengers
CG 22 28 12 04-Amendment-Travel Agency Tours
CG 22 29 11 85-Exclusion-Property Entrusted
CG 22 30 07 98-Exclusion-Corporal Punishment
CG 22 31 07 98-Exclusion-Riot, Civil Commotion or Mob Action
CG 22 32 07 98-Exclusion-Professional Services-Blood Banks
CG 22 33 07 98-Exclusion-Testing or Consulting Errors & Omissions
CG 22 34 07 98-Exclusion-Construction Management Errors & Omissions
CG 22 36 07 98-Exclusion-Products & Professional Services
CG 22 37 07 98-Exclusion-Products & Professional Services
CG 22 38 07 98-Exclusion-Fiduciary or Representative Liability of Financial Institutions
CG 22 39 07 98-Exclusion-Camps or Campgrounds
CG 22 40 01 96-Exclusion-Medical Payments to Children Day Care Centers
CG 22 41 10 01-Exclusion-Housing Projects Sites
CG 22 42 11 85-Existence or Maintenance of Streets, Roads, Highways or Bridges
CG 22 43 07 98-Exclusion-Engineers, Architects or Surveyors Professional Liability
CG 22 44 07 98-Exclusion-Services Furnished by Health Care Providers
CG 22 45 07 98-Exclusion-Specified Therapeutic or Cosmetic Services
CG 22 46 11 85-Exclusion-Rolling Stock-Railroad Construction

CG 22 47 11 85-Exclusion-Saline Substances Contamination
CG 22 48 03 05-Exclusion-Insurance & Related Operations
CG 22 50 11 88-Exclusion-Failure to Supply
CG 22 51 07 98-Exclusions-Law Enforcement Activities
CG 22 52 10 93-Exclusion-Medical Payments Coverage
CG 22 53 11 85-Exclusion-Laundry & Dry Cleaning Damage
CG 22 54 11 85-Exclusion-Logging & Lumbering Operations
CG 22 56 07 98-Exclusion-Injury to Volunteer Firefighters
CG 22 57 01 96-Exclusion-Underground Resources & Equipment
CG 22 58 11 85-Exclusion-Described Hazards
CG 22 60 12 07-Limitation of Coverage-Real Estate Operations
CG 22 62 05 09-Underground Resources & Equipment Coverage
CG 22 63 01 96-Stevedoring Operations Limited Completed Operations Coverage
CG 22 64 07 98-Pesticide or Herbicide Applicator Coverage
CG 22 65 09 99-Optical & Hearing Aid Establishments
CG 22 66 11 85-Misdelivery of Liquid Products Coverage
CG 22 67 10 93-Corporal Punishment
CG 22 68 09 97-Operation of Customers Autos on Particular Premises
CG 22 69 10 01-Druggists
CG 22 70 11 85-Real Estate Property Managed
CG 22 71 10 01-Colleges or Schools
CG 22 72 03 05-Colleges or Schools
CG 22 73 07 98-Exclusion-Oil or Gas Producing Operations
CG 22 74 10 01-Limited Contractual Liability Coverage For Personal & Advertising Injury
CG 22 75 07 98-Professional Liability Exclusion-Computer Software
CG 22 76 07 98-Professional Liability Exclusion-Health or Exercise Clubs
CG 22 77 07 98-Professional Liability Exclusion-Computer Data Processing
CG 22 78 07 98-Hazardous Material Contractors
CG 22 79 07 98-Exclusion-Contractors-Professional Liability
CG 22 80 07 98-Limited Exclusion-Contractors-Professional Liability
CG 22 81 01 96-Exclusion-Erroneous Delivery or Mixture
CG 22 87 07 98-Exclusion-Adult Day Care Centers
CG 22 88 07 98-Professional Liability Exclusion-Electronic Data Processing Services & Computer Consulting or Programming Services
CG 22 90 07 98-Liability Exclusion-Spas or Personal Enhancement Facilities
CG 22 91 07 98-Exclusion-Telecommunication Equipment or Service Providers Errors & Omissions
CG 22 92 12 07-Snow Plow Operations Coverage
CG 22 93 12 07-Lawn Care Services Coverages
CG 22 94 10 01-Exclusion-Damage to Work by Subcontractors
CG 22 95 10 01-Exclusion-Damage to Work by Subcontractors-Sites or Operations
CG 22 96 10 01-Limited Exclusion-Personal & Advertising Injury-Lawyers
CG 22 97 10 01-Druggists-Broadened Coverage
CG 22 98 12 04-Exclusion-ISP & Internet Access Providers Errors & Omissions
CG 22 99 12 04-Professional Liability Exclusion-Web-Site Designers
CG 23 01 12 04-Exclusion-Real Estate Agents or Brokers Errors or Omissions
CG 24 01 12 04-Non-Binding Arbitration
CG 24 02 12 04-Binding Arbitration
CG 24 03 11 85-Waiver of Charitable Immunity
CG 24 04 05 09-Waiver of Transfer of Rights of Recovery Against Others to Us
CG 24 05 12 04-Financial Institutions-Fiduciary Interest Only
CG 24 07 01 96-Products/Completed Operations Hazard Redefined
CG 24 08 10 93-Liquor Liability

CG 24 09 07 98-Governmental Subdivisions
CG 24 10 07 98-Excess Provision-Vendors
CG 24 11 12 04-Fiduciaries-Fiduciary Interest
CG 24 12 11 85-Boats
CG 24 14 11 85-Waiver of Governmental Immunity
CG 24 15 10 01-Limited Pollution Liability Extension
CG 24 16 12 07-Canoes or Rowboats
CG 24 17 10 01-Contractual Liability-Railroads
CG 24 18 09 99-Seed Merchants-Erroneous Delivery or Mixture
CG 24 19 09 99-Seed Merchants-Erroneous Delivery or Mixture
CG 24 20 09 99-Seed Merchants-Erroneous Delivery or Mixture
CG 24 21 09 99-Seed Merchants-Erroneous Delivery or Mixture
CG 24 22 10 01-Amendment of Coverage Territory-Worldwide
CG 24 23 10 01-Amendment of Coverage Territory-Additional Scheduled Countries
CG 24 24 10 01-Amendment of Coverage Territory-Worldwide With Specified Exceptions
CG 24 25 12 04-Limited Fungi or Bacteria Coverage
CG 24 26 07 04-Amendment of Insured Contract Definition
CG 24 27 03 05-Limited Contractual Liability-Railroads
CG 25 02 07 98-Amendment of Limits of Insurance
CG 25 03 05 09-Designated Construction Project(s) General Aggregate Limit
CG 25 04 05 09-Designated Location(s) General Aggregate Limit
CG 26 17 03 07-Wisconsin Changes-Notice of Cancellation For Diver Schools
CG 27 02 01 96-Exclusion of Accidents, Products, Work or Location
CG 27 03 01 96-Amendment-Section V-Extended Reporting Periods
CG 27 05 01 96-Exclusion-Accidents, Products, Work or Location
CG 27 10 12 07-Supplemental Extended Reporting Period Endorsements
CG 27 11 07 98-Supplemental Extended Reporting Periods
CG 27 15 12 07-Extended Reporting Periods Endorsements-Employee Benefits
CG 28 01 01 96-Extended Reporting Period Endorsement
CG 28 02 10 93-Insured Site Definition
CG 28 03 01 96-Supplemental Extended Reporting Period
CG 28 04 10 93-Earlier Notice of Cancellation Provided by Us
CG 28 05 10 01-Personal Injury Liability
CG 28 06 01 96-Limitation of Coverage to Insured Premises
CG 28 07 12 07-Principals Protective Liability Coverage
CG 28 12 10 01-Pesticide or Herbicide Applicator Coverage
CG 28 26 01 93-Wisconsin Changes-Amendment of Policy Conditions
CG 28 33 01 96-Voluntary Clean-Up Costs Reimbursement
CG 28 34 01 96-Supplemental Extended Reporting Period
CG 28 35 01 96-Supplemental Extended Reporting Period-Specific Accidents, Products, Work or Locations
CG 28 90 01 93-Wisconsin Changes-Amendment of Policy Conditions
CG 29 35 05 09-Additional Insured-State or Governmental Agency or Subdivision or Political Subdivision-Permits or Authorization
CG 29 51 12 07-Employment-Related Practices Exclusion
CG 29 52 09 89-Amendment of Liquor Liability Exclusion
CG 29 53 09 89-Amendment of Liquor Liability Exclusion-Exception For Scheduled Activities
CG 29 78 11 94-Exclusion-Underground Storage Tank Incidents
CG 29 88 10 93-Waiver of Transfer Rights of Recovery Against Others to Us
CG 30 11 11 94-Wisconsin Changes-Cancellation & Nonrenewal
CG 30 51 11 94-Wisconsin Changes-Amendment of Policy Conditions
CG 30 57 11 94-Supplemental Extended Reporting Period
CG 31 15 10 01-Construction Project Management Protective Liability Coverage

CG 31 31 12 04-Fungi or Bacteria Exclusion
CG 31 32 12 04-Limited Fungi or Bacteria Coverage
CG 31 66 12 04-Exclusion-Exterior Insulation & Finish Systems
CG 31 67 12 04-Exclusion-Exterior Insulation & Finish Systems
CG 31 68 12 07-Exclusion-Coverage A-Product Withdrawal Expense
CG 31 69 12 04-Exclusion-Coverage B-Product Withdrawal Liability
CG 31 70 12 04-Exclusion-Product Tampering
CG 31 71 12 04-Exclusion-Product Replacement, Repair or Repurchase
CG 31 72 12 04-Coverage Extension-Coverage A-Product Restoration Expense
CG 31 73 12 04-Extended Reporting Period Endorsement For Electronic Data Liability Coverage
CG 31 74 12 04-Exclusion of Newly Acquired Organization as Insureds
CG 31 98 12 04-Calculation of Premium
CG 31 99 12 04-Nuclear Energy Liability Exclusion Endorsement
CG 32 92 08 09-Wisconsin Changes-Notice of Cancellation & Nonrenewal For Liquefied Petroleum Gas Retail Suppliers
CG 33 35 12 04-Wisconsin Changes
CG 33 70 03 05-Silica or Silica-Related Dust Exclusion
CG 33 71 03 05-Silica or Silica-Related Dust Exclusion
CG 33 76 05 09-Communicable Disease Exclusion
CG DS 01 10 01-Commercial General Liability Declarations
CG DS 02 07 98-Owners & Contractors Protective Liability Declarations
CG DS 03 07 98-Liquor Liability Declarations
CG DS 04 07 98-Railroad Protective Liability Declarations
CG DS 05 07 98-Products/Completed Operations Liability Declarations
CG DS 06 07 98-Pollution Liability Declarations
CG DS 07 07 98-Underground Storage Tanks Liability Declarations
CG DS 09 12 04-Electronic Data Liability Declarations
CG DS 10 12 04-Product Withdrawal Declarations
IL 00 03 09 08-Calculation of Premium
IL 00 17 11 98-Common Policy Conditions
IL 00 21 09 08-Nuclear Energy Liability Exclusion
IL 02 83 09 07-Wisconsin Changes-Cancellation & Nonrenewal
IL 09 11 11 85-Supplement to Retrospective Premium Endorsement-Final Premium Computation
IL 09 17 11 85-Resident Agent Countersignature
IL 09 18 10 93-Retrospective Premium-One Year Plan-Multiple Lines
IL 09 19 10 93-Retrospective Premium-Three Year Plan-Multiple Lines
IL 09 20 10 93-Retrospective Premium-Long Term Construction Project-Multiple Lines
IL 09 21 04 84-Retrospective Premium-Short Form
IL 09 22 04 84-Retrospective Premium-Exclusion of Aviation Exposures
IL 09 23 04 84-Retrospective Premium-Exclusion of Retrospective Development Factors
IL 09 30 03 87-Retrospective Premium Endorsement One-or Three-Year Plan-Multiple Lines
IL 09 85 01 08-Disclosure Pursuant to Terrorism Risk Insurance Act
IL 09 98 01 07-Disclosure of Premium Through End of Year For Certified Acts of Terrorism Coverage
IL 09 99 01 07-Disclosure of Premium & Estimated Premium For Certified Acts of Terrorism Coverage
IL 12 01 11 85-Policy Changes
IL DS 00 09 08-Common Policy Declarations

For More Information

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Testimony
Senate Committee on the Judiciary

Senate Bill 589
Transfer of Risk in Construction Contracts
March 23, 2010

Steve Garrison
Duwe Metal Products
(Menomonee Falls, WI)

On Behalf Of
American Subcontractors Association of Wisconsin

Good morning Chairwoman Taylor and members of the committee. My name is Steve Garrison and I am here today to testify in support of SB 589, legislation that will level the playing field in the construction contracting chain. I am employed by Duwe Metal Products (Menomonee Falls), a privately-held small business that operates as a subcontractor on commercial projects throughout southeastern Wisconsin and the state. As part of my duties I manage the risk within the business. In addition, I serve on the Board of Directors of the American Subcontractors Association of Wisconsin and I served as its president from 2005-2007.

Construction workplaces are dynamic. Even if the work is the same – which it seldom is – the conditions on the site can change quickly because of the weather, the work of other tradespeople on the site, or the delivery of materials. My testimony speaks to that – the real world that is the construction industry.

We are always working to eliminate risk on our projects, but about the best we have ever been able to do is to manage that risk. What we can manage is what we control

– nothing more. We don't control the entirety of the workplace and we certainly don't control the negotiations that are part of every contract we are asked to sign.

Every day, as part of my job, I review construction contracts. And every day, I see risk transfer clauses. The words may be different, but essentially, they all do the same things – they ask my company to take responsibility for things that are not our responsibility and things that are beyond our control. They ask my company to insure and defend someone else for the damages they cause.

Naturally, I've tried to negotiate these clauses out before signing, but with little success. Occasionally I might be able to limit my company from paying an entire claim when we are found to be zero percent responsible and another party is 100 percent responsible. However, that is not always the case. Imagine a circumstance where my company is found to be ZERO percent liable – or even 1 percent liable – for an accident but is required to pay 100 percent of the claim.

We think every party should be responsible for its actions and that every contract should say just that. Buy when we push hard on that subject, we are reminded that there are plenty of other contractors out there willing to do the work. What choice do we have? We either sign the contract and hope for the best or we walk away from the project. Despite everything we have done to provide the best value, we have to accept these unfavorable terms or risk losing the project – projects that create jobs for our union workforce.

I can tell you from experience that the contracts we are being asked to sign are growing worse each day. With an economy such as this, there are more bidders than ever looking for opportunities. We don't have the luxury of picking and choosing our

business partners. We go to where the work is and we find that more and more is being asked of us – including more onerous risk transfer provisions. We know of one, for instance, where contractors were being asked to cover the risk of a prime contractor for ten years – despite the fact that most of our insurance covers a shorter period of time. If we sign that contract, we risk being uninsured for a claim – a claim that resulted not from our own work, but from someone else's. How do I manage that risk, that uncertainty?

It's true that I can generally purchase insurance to cover this risk, but so can the contractors I work for. I wonder what will happen if a day comes when my carrier starts to evaluate them as closely as they evaluate me. My company is underwritten every year, but my customers are not. When I pay a claim for someone else's negligence it costs me money. My insurance rates go up not because of something I did, but because of something another contractor did. It seems to me my insurance company might want to know who I'm working for and maybe, as they did in one trade, tell me who I can and can't work for.

There was a case in Wisconsin where the employee of a subcontractor was injured by a piece of equipment owned and maintained by the project owner. The employee sued the owner in court, and while the owner was found to be negligent, their responsibility for the defective piece of equipment was simply transferred to the prime contractor and then to the subcontractor. The subcontractor had no control over the maintenance of the equipment, but it paid the claim because the owner was allowed to transfer its risk. I don't think that's right – that the subcontractor has a six- or seven-figure settlement against its insurance policy when they couldn't control the risk and the insurance

company didn't know the risk existed because they evaluated the subcontractor's workplace and not the owner's.

When our company causes an accident, we need to be held responsible. When an owner, the general contractor, and our company all contribute to the cause of an accident, we all need to be held responsible. And when we are responsible, we not only need to be ruled responsible, but held responsible by covering the cost of the judgment and defense on our own, not by shifting that cost to someone else.

What is currently taking place in court cases is quite the contrary. Court decisions are being circumvented because of the transfer of risk in construction contracts. Following a court ruling that holds one party 100 percent liable, 99 percent liable, 50 percent liable, or whatever number you choose, you would expect each party to pay its allocated responsibility. In reality, the contractor that is higher up in the chain simply points to its contract, the risk transfer clause, and they're free and clear. We even pay for their attorneys through duty to defend clauses.

For years, we have been discussing this within the industry and have made no progress. We need fairness in our contract dealing and we need to balance the power among the parties in construction contracts. We need to do this legislatively and we need to pass SB 589.

I appreciate the opportunity to testify today on this important legislation. On behalf of ASA, Duwe Metal Products, and the subcontracting community across the state, thank you for your consideration. We urge you to SUPPORT SB 589.

If you have any questions, I will be happy to answer them.

POSITION PAPER ON SENATE BILL 589

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I. COMMON BELIEFS

A. **Society Benefits from Fair and Efficient Assignment of Construction Risk**
Construction risks, as well as the financial consequences of those risks, are minimized when individual construction risks are indentified and all of the financial consequences of that risk are assigned to the contractor most able to prevent, control and insure the risk.

B. **All Contractor's First and Most Important Safety Responsibility is to its Employees**
Construction projects create unsafe physical conditions. Construction site employee safety efforts are maximized when each contractor on the jobsite is assigned primary responsibility for (1) identifying unsafe conditions in their individual work areas, (2) protecting its own employees against injury from those unsafe conditions and (3) bearing the financial consequences of their employee injury if the contractor fails to perform these first two obligations.

C **Current Wisconsin Tort Law and Safe Place Statute Unfairly and Inefficiently Reassign the Financial Consequences of a Subcontractor's Employee Injury to the General Contractor**
Each subcontractor is given the right to use its own means and methods to complete its construction work and enforce its safety program. However, if the subcontractor fails to protect its workers from unsafe conditions in the subcontractor's work area, Wisconsin Tort Law and Safe Place Statute unfairly makes the general contractor financially responsible the subcontractor's failure to protect its employees from unsafe conditions, even if the general contractor was not responsible for creating the unsafe condition. The current law even allows the subcontractor's workers compensation insurer to subrogate against the general contractor to recover its workers compensation payments to the injured subcontractor employee.

D. **Indemnification Clauses are needed to Fairly and Efficiently Assign Employee Injury Risk**
General Contractors can not babysit the safety efforts of each subcontractor on the job. Subcontractors must assume primary responsibility and liability for protecting their employees from unsafe conditions in their individual work areas. Indemnification clauses allow for the fair and efficient transfer of liability for subcontractor employee injury back to the subcontractor when the subcontractor fails to perform their primary safety duties for their employees.

E. **Prohibiting Insurance is Against the Public's Best Interest**
Insurance coverage is readily available and very affordable to insure subcontractor's indemnity and insurance requirements for the protection of its employees on construction contracts. Construction insurance requirements are beneficial to society because insurance (1) protects parties to the construction contract against large financial loss and (2) provide a substantial and reliable source for financial recovery to those injured or damaged by the construction work. Any unnecessary statute provision that prohibits readily available and affordable insurance that would provide financial benefit in the event of employee injury is against the public's best interests.

F. **Prohibiting the right to waive subrogation rights for damage to the work or damage to property adjacent to the work creates huge uninsured loss exposures for all contractors during construction and after the work is completed.**

II. COMMON ASSESSMENT OF ASSEMBLY BILL 589

A. **Interferes with the Freedom to Negotiate and Fairly Assign Construction Risk**
This bill would prohibit the one contractor of a construction contract to transfer its legal liability to a second contractor for loss or injury that may arise out of the second contractor's failure to perform the second contractor's safety responsibilities to its own employees.

B. **Insulates Subcontractors from Liability for its Employee Safety**
Workers Compensation would be subcontractor's only liability for causing injury to their employee. Even then, the subcontractor's workers compensation insurer can completely recover its claim payment because the insurer is allowed to subrogate against the general contractor and/or project owner. Owners and general contractors would unfairly bear cost of injured employee's lawsuits.

C. **Disrupts Responsibility for Jobsite Safety**
This bill would diminish the effectiveness of jobsite safety programs because it prohibits the assignment of financial cost to the contractor responsible for noncompliance of their own employee safety responsibilities.

C. **Prohibits the Purchase of Insurance that Protects Employees and Contractors**
Society benefits when the financial consequence of loss can be transferred to an insurance company. If one party to a construction contract were willing to pay the premium for insurance that is readily available and affordable for purchase by the other party, why should those that are injured or damaged is deprived of its protection? Risk is passed to an insurance company and the party requesting the protection pays the premium.

D. **Prohibits Waiver of Subrogation Rights for Property Damage**
This unnecessarily bill provision increases property insurance uncertainty and premium costs.

III. COMMON POSITION

I believe that the insurance and construction industry would support anti-indemnification legislation that would prohibit the unfair transfer of liability that cannot be (1) identified, measured, prevented and controlled or (2) insured by the assuming party, that any such legislation does not:

A. Interfere with the rights of contracting parties to transfer the joint liability created by construction work from one contractor to second contractor, if that second contractor is more able to prevent or control the loss exposure.

B. Violate the principal that requires every contractor to be primarily responsible for the identification of unsafe conditions in their individual workplace and to protect their employees against injury from those unsafe conditions.

C. Interfere with the owner's or the general contractor's ability to effectuate a job safety program by prohibiting the assignment of the financial consequences for subcontractor employee injury to the subcontractor who failed to protect its employees from unsafe conditions.

D. Prohibit a requirement for the purchase of insurance protection for the benefit of the contracting parties and for the benefit of those parties injured or damaged by the contracted work, especially when such coverage is readily available and affordable from willing and able insurers and the cost of that coverage is borne the party requesting the insurance protection.

E. Prohibit the transfer of sole negligence liability on certain types of very hazardous construction projects where the contractor's potential profit is heavily outweighed by the contractor's potential legal liability for performing the construction work. For example, contracts to remediate very hazardous environmentally damaged properties.

F. Prohibits the waiver of subrogation rights for damage to property.

IV. WORKABLE ANTI-INDEMNIFICATION SOLUTION

I believe both the construction and the insurance industry would support anti-indemnity legislation that ultimately assigns the legal liability for damage or injury to the contractor most able to identify, prevent, control and insure that damage or injury. Therefore, indemnity agreements relating to any construction work should be limited to:

1) indemnification for damages or injury to the extent of the indemnitor's negligence or the negligence of those for which the indemnitor is liable, or

2) indemnification for the indemnitee's safe place statute liability for injury to the indemnitor's employees or the employees of subcontractors or sub-subcontractors to the indemnitor or

3) indemnification of indemnitee's general supervision or safety supervision duties to employees of the indemnitor or employees of the indemnitor's subcontractors or sub-subcontractors.

This type of anti-indemnification statute would protect all contractors on the project site from any obligation to indemnify for liability beyond the indemnitor's ability to control. However, this type of legislation does not address the reassignment of liability that may be necessary for the very hazardous or dangerous construction risks.

Wisconsin Builders Association

March 23, 2010

TO: Members of the Senate Committee on Judiciary, Corrections, Insurance, Campaign Finance Reform, and Housing

FROM: Brad Boycks
Wisconsin Builders Association®
Director of Government and Political Affairs

RE: Comments concerning Senate Bill 589 (SB 589) relating to indemnity clauses in construction contracts

Today the Senate Committee on Judiciary, Corrections, Insurance, Campaign Finance Reform, and Housing is hearing testimony concerning (SB 589) relating to indemnity clauses in construction contracts.

The Wisconsin Builders Association opposes SB 589 as currently drafted because they bar the use of all but the narrowest form of indemnification clauses (*i.e.*, the indemnitor indemnifies only for his/her own conduct). Additionally, they do not address the disparate affect on contractors and design professionals, which is a significant concern of the design professional organizations.

Indemnification is a valuable tool that does not inherently offend public policy. Correctly used, indemnification clauses are part of a broader contractual risk management that can serve various important purposes, including: a) allocating responsibility and risk to the party that is best able to manage (and therefore minimize) the risk of harm; and b) providing a combination of allocation and protections (*e.g.*, insurance and bonds) to timely address injuries or damages without resort to lengthy, complex, and expensive litigation. The proposed changes to the law would undermine both of these objectives.

WBA recognizes that there are legitimate public policy concerns with the issue of indemnification clauses and we would be willing to further discuss these matters. We believe that this is a discussion that would be very well suited to address as a Legislative Council Study Committee and/or to be discussed by the State Bar of Wisconsin Construction and Public Contract Law Section.

Enclosed for your review is a memo written by attorneys from Axley Brynelson, L.L.P. that further discuss these issues and our concerns with SB 589 as currently drafted.

NAHB Member

Axley
Axley Brynelson, LLP

MEMORANDUM

TO: Bradley Boycks
Wisconsin Builders Association

FROM: Robert Procter
Carl Sinderbrand
Brian Mullins
Charles Sweeney

DATE: March 23, 2010

RE: Wis. Stat. § 895.447

ISSUE PRESENTED

Whether the proposed act to repeal Wis. Stat. § 895.447(1) and (3), and to create §895.447(1g), (1m), and (1r) fairly and properly addresses the problems that exist with the current version of Wis. Stat. § 895.447 and with indemnification clauses in general.

BRIEF RESPONSE

Section 895.447 has caused confusion for the courts and the construction industry. It should be revised to refine and clarify the law relating to risk allocation in general and limitations on liability in particular. There are some positive attributes to this act; for example, subsec. (1g) clarifies the meaning of important terms. However, the proposed revisions as a whole do not accomplish the overall purpose.

We believe that the Wisconsin Builders Association ("WBA") should oppose the proposed revisions because they bar the use of all but the narrowest form of indemnification clauses (*i.e.*, the indemnitor indemnifies only for his/her own conduct). Additionally, they do not address the disparate affect on contractors and design professionals, which is a significant concern of the design professional organizations.

Indemnification is a valuable tool that does not inherently offend public policy. Correctly used, indemnification clauses are part of a broader contractual risk management that can serve various important purposes, including: a) allocating responsibility and risk to the party that is best able to manage (and therefore minimize) the risk of harm; and b) providing a combination of allocation and protections (*e.g.*, insurance and bonds) to timely address injuries or damages without resort to lengthy, complex, and expensive litigation. The proposed changes to the law would undermine both of these objectives.

We encourage the WBA to take the initiative to work with the other construction industry associations to develop revisions to § 895.447 that: a) preserve the parties' ability to contractually agree to manage risk; b) address unfairness and discrete public policy concerns that warrant modification; and c) provide a clear, well written law that can be administered by parties and applied and enforced by the courts.

ANALYSIS

Clients and trade associations have raised various questions regarding both the existing and proposed statute. We address some of the more common questions below.

1. What is the purpose and effect of Wis. Stat. § 895.447?

Section 895.447 prevents parties from contractually agreeing to limit or eliminate tort liability.

Wis. Stat. § 895.447 in its current form prohibits provisions in contracts "related to construction" that limit or eliminate tort liability. A tort is the breach of deviation from one's duty of care to act reasonably, irrespective of any contractual obligations. It is a societal duty based on normal course of conduct and expectations, such as one's duty not to cause harm to another or his or her property. Common torts are negligence, nuisance and trespass. A tort may also be based on a duty unique to one's activities or expertise, including the duty to drive a car attentively or the duty to design a building to code.

Section 895.447 has at least two types of applications:

1. It prevents parties from waiving or limiting tort liability for personal injury or property damage. An illustrative clause that would violate the statute is: "Subcontractor waives all rights and claims for any bodily injury or property damages that are the result of any negligent actions of Contractor or Contractor's employees on the jobsite."

2. It prohibits parties from waiving or limiting damages relating to negligent performance of the work. An illustrative clause that would violate the statute is: "Contractor's total liability for any defective work is limited to $10,000 or the amount of available insurance, whichever is greater."

This second application has a differential application to contractors and design professionals. The "economic loss doctrine" ("ELD") provides that there is no tort liability for economic losses associated with products. That is, one is limited to contract remedies for damages associated with a product being defective or not performing as expected. The ELD, however, does not apply to contracts for services. In a number of cases during the 2000s, the Wisconsin Supreme Court has concluded that construction of a building is a "product," but that design and other design professional activities are "services." Therefore, the second application of § 895.447 has virtually no application to contractors but significantly limits design professionals' ability to manage risk by contract.

2. How is § 895.447 affected by the Wisconsin Court of Appeals' decision in Gerdmann v. U.S. Fire Ins. Co., 119 Wis. 2d 367, 350 N.W.2d 730 (1984)?

The Court of Appeals held that an indemnification clause is not prohibited. Indemnification provisions do not limit or waive tort liability; rather, they shift the responsibility for paying the claims between parties.

There is information in the legislative historical record that the purpose of § 895.447 was to limit the use of indemnification clauses in construction contracts. In the only case addressing the statute to date, the Court of Appeals declared that it does not have that effect. The Gerdmann decision also well illustrates the interplay between tort liability and indemnification clauses.

In Gerdmann, Roen Salvage Company had a contract with the Manitowoc Company to provide salvage services on Manitowoc's property. The contract included a clause stating that Roen would "indemnify" and hold harmless Manitowoc from any liability for injury or death to persons from or arising out of any of the work Roen performed under the contract. While performing its work, a Roen dump truck drove down a road past Mr. Gerdmann, an employee for another contractor on the site. A cable on the truck became looped around a wooden pole and flipped the pole across the road, striking and injuring Gerdmann. Gerdmann filed a tort claim against Roen, alleging that Roen was negligent in allowing the loose cable on the truck to come in contact with the wooden pole that injured him. Roen agreed to pay Gerdmann three million dollars.

Roen filed its own claim against Manitowoc, alleging that Manitowoc should be partially responsible for the damages paid to Gerdmann because Manitowoc committed a separate tort of having an unsafe work place under Wisconsin's safe place statute: *i.e.*, the wooden pole should not have been lying next to the road. Manitowoc responded that if it bore any responsibility for the accident, Roen was required to indemnify Manitowoc under the indemnification clause in their contract; *i.e.*, Roen must pay Gerdmann for Manitowoc's liability.

Roen argued that § 895.447 prohibits the enforcement of the indemnification clause because the indemnification clause was an agreement to limit or eliminate Manitowoc's tort liability. The Court of Appeals disagreed. It held that an indemnity clause neither limited nor eliminated Manitowoc's tort liability to Gerdmann. Rather, it shifted responsibility for payment of those damages to Roen.

The proposed legislation would preclude this type of scenario from happening by prohibiting such indemnification clauses.

3. What is the significance of indemnification in the construction industry?

Indemnification is one component of a broader risk allocation system that historically has been used to fairly and cost-effectively allocate and manage risk among parties.

Allocation of construction site liability is a complicated problem both factually and legally. At any given construction site there will be employees of the general contractor, subcontractors,

material suppliers, the owner, and other independent contractors. Construction sites are often dangerous and a fertile area for injuries. For anyone injured at the site, there will be layers of liability and insurance coverage.

Using the facts of Gerdmann as an illustration, the parties and courts could be faced with the following claims, counterclaims and coverage issues:

a. Gerdmann claim against his employer's worker compensation policy (the employer is protected from suit under Wisconsin's Worker Compensation law).

b. Gerdmann claim against Manitowoc (the owner) under Wisconsin's safe place statute.

c. Gerdmann negligence claim against Roen (the trucking company)

d. If the dump truck driver was an independent contractor for Roen, claims against the independent truck driver or his employer.

d. Gerdmann product liability claim against the manufacturer of the truck if the vehicle was not correctly designed.

e. Contribution cross-claims among all defendants to allocating liability.

A lawsuit with this range of claims would not be uncommon; but it would be very expensive, time-consuming, and uncertain as to outcome. From a risk management perspective, it is difficult and costly to determine the relative risks one bears as an owner, contractor, and subcontractor and what kind and amount insurance one should have in place for those risks.

Industry-wide standard form contracts, including EJCDC, AIA, and AGC Consensus Documents, include a number of clauses that together form the risk allocation core of the agreement. These clauses include indemnification, bond and insurance requirements, limitations on liability, and dispute resolution. Properly balanced, these clauses allow the parties to fairly allocate risk, provide the appropriate insurance coverage, and distribute the costs of risk assumption. The standard form agreements prevail in the industry because they are perceived as both fair and cost-effective, and because they provide some predictability of outcome.

Problems can arise in our industry when parties develop their own contracts that are not balanced. This is most common among significant owners, who have the ability to impose burdensome risks on contractors; or contractors who can pass significant risk to their subcontractors. Unbalanced risk allocations in contracts have led to legitimate statutory limitations in various states. It is critical, however, that such restrictions be limited to the offending conduct without impairing legitimate activities.

4. What effect would the proposed revisions have on the allocation of risk in the construction industry?

The proposed legislation's attempt to cure a perceived unfairness significantly undermines the ability of parties to allocate risk and liability contractually and may adversely impair the use of insurance and settlement agreements to manage risk.

We offer three examples of how the proposed legislation is problematical.

a. There are three generally recognized forms of indemnification: a) narrow (indemnification only to the extent of one's own negligence); b) middle (indemnification if the indemnitor is negligent in whole or in part); and c) broad (indemnification regardless of fault). Typically, the first two forms of indemnification are commonly used in the industry. The proposed legislation, however, likely would preclude the middle form (as well as the broad form), even though it is a commonly used insurable risk.

b. A settlement agreement resolving a construction-related dispute may similarly fall within the definition of an indemnity provision or waiver of subrogation, and may be precluded under subsecs. (1m) and (1r).

c. The design professional community is troubled by the law that shields contractors but not design professionals from tort liability for defective work. The statute exacerbates this differential treatment by precluding limitations on tort liability. The proposed revisions preserve that distinction, which likely will result in strong objection by the design professionals.

CONCLUSION

The WBA should oppose the proposed revisions to Wis. Stat. § 895.447. Clarifying and correcting some potential unfairness in the current version of the law are laudable goals. However, the proposal unduly restricts the use of indemnification clauses in construction contracts, thereby impairing the ability of the parties to avoid costly litigation and to rationally manage their risk. Additionally, the proposal does not address issues that will be raised by design professionals.

As an alternative, we recommend that WBA join forces with other industry organizations to develop an alternative proposal that better harmonizes legitimate public policy objectives with the needs of the industry and common practice.

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Testimony
Senate Committee on the Judiciary

Senate Bill 589
Transfer of Risk in Construction Contracts
March 23, 2010

Kevin Henrichs
Lippert Tile Company
(Menomonee Falls, WI)

On Behalf Of
American Subcontractors Association of Wisconsin

Good morning Chairwoman Taylor and committee members. My name is Kevin Henrichs and I am employed by Lippert Tile Company (Menomonee Falls). We are a privately-held small business that operates as a subcontractor on commercial projects throughout southeastern Wisconsin. Among my duties and other responsibilities I perform contract review and risk management services for our company. I am also serving as the volunteer president of the American Subcontractors Association of Wisconsin, an association that was founded, in part, by the original owner of Lippert Tile Company some twenty-some years ago.

When ASA was created, the idea was to address all of the various issues that affect the relationship between subcontractors and those they do business with – from lien laws, to prompt payment, to bonding, and to retainage. We have made a great deal of progress on some of these issues and less on others, but the issue of risk transfer has lingered on, unresolved, for too long.

The industry has made several attempts to resolve this issue on its own, but it's clear that it will take legislation to make progress. I am here to testify in support of SB

589 and our organization is grateful to Senator Taylor for introducing this legislation that will go a long way to protect all contractors from onerous provisions in construction contracts.

Let me explain risk transfer in a real way. We identify projects where our company could provide construction services. We work to provide the best price, delivery, and quality possible and then we submit our proposal to our customers. As a condition of doing the work, we are asked to accept a number of terms in our customers' contract. Some of the contract terms we can accept, some we can negotiate, and others are not negotiable. Risk transfer all too often falls in the latter category – and we don't have the ability to negotiate.

So what is risk transfer?

It's where our customer requires us to assume responsibility – negligence, liability, insurance costs, and defense costs – not only for our own acts but for their acts as well. That can happen in any number of ways, using:

- indemnification clauses, (we agree to compensate them for losses related to their negligence)
- hold harmless agreements, (we agree that they cannot be blamed for their negligence)
- duty to defend clauses, (we agree to pay attorney fees related to their negligence)
- additional insurance requirements, (we agree to pay for their insurance to cover the cost of their negligence)

– waivers of subrogation (we agree that our insurance company cannot recover its losses from the insurance company that represents them)

All of these issues are and must be addressed in SB 589. Each is a way by which risk can be transferred and all of them must be addressed collectively.

For example, if there is an accident on a project and we are found to be 0 percent, 1 percent, or 20 percent liable, our customers – a contractor, construction manager, or owner – can transfer 100 percent of the liability for the accident to us. As a flooring contractor, it's not unusual us for us to not start working on a project until it is nearing completion. By signing an agreement with a risk transfer provision, however, our company can be held responsible for an accident that occurs even before our employees have started working on the project.

That's the way it is in the construction industry. One party – the one that is higher in the contract chain – transfers its risk to another that is further down the chain. And if you don't agree to their terms, they'll find someone else who will accept them, for there is always someone who will accept the terms simply because they need the job.

The bottom line is that each party should be responsible for what it's responsible for. Nothing in the bill affects the amount of damages that can be awarded. What is an insurable risk to the subcontractor is an insurable risk to the prime contractor and to the owner.

Forty-one states have some form of protection against risk transfer. Wisconsin has no protections at all. Most recently, Colorado, Georgia, and Oklahoma passed measures substantially similar to SB 589. Our peers report that they are working on similar measures throughout the United States.

In 1977, the Wisconsin Legislature agreed to language in this state that prohibited a party in a construction agreement form avoiding liability. A 1985 court decision interpreted this to mean the responsible party could transfer its liability by contract to another. We think it's time to restore the balance that was there – at the desire of the legislature – to prohibit the avoidance and the transfer of risk.

ASA and other national associations – including private- and public-sector owners and general contractors – have been working on ways to reduce disputes in construction contract documents for many years. As recently as two years ago, the ConsensusDocs were issued. The ConsensusDocs are national model agreements that address contracts between owners and prime contactors as well as prime contractors and their subcontractors. Agreed to by all participating stakeholders – including ASA and AGC – the ConsensusDocs include risk transfer language that is consistent with SB 589 wherein each party is responsible for its own negligence. These national model agreements serve as evidence that there is a need and desire for fairness in construction contracts. So too is a model agreement between prime and subcontractor members of the Metropolitan Milwaukee Builders Association. We are not plowing new ground here.

Keep in mind, a subcontractor can also transfer its risk by hiring another subcontractor. As I noted, I'm here today on behalf of the American Subcontractors Association of Wisconsin, and our membership includes every trade – from large mechanical contractors to small landscape contractors. Collectively we support this bill because the answer is not to continue to transfer our risk or any other contractors' risk. This bill is as much a restriction on us as it is any other party in the contracting chain.

I ask you today, do you think my flooring business should be held responsible for actions by a plumbing contractor or a prime contractor? Or a landscape contractor held responsible for my actions? I think the answer is no.

On behalf of the ASA-Wisconsin, Lippert Tile Company, and thousands of subcontractors across the state, we strongly urge you to support SB 589 and correct this gap in state law.

Thank you for your consideration. I would be happy to address any questions you have at this time.

both this section and s. 943.212, 943.245 or 943.51 regarding the same incident or occurrence, the plaintiff may choose which action to bring. If the plaintiff has a cause of action under both this section and s. 95.195, the plaintiff must bring the action under s. 95.195.

(6) A person is not criminally liable under s. 943.30 for any action brought in good faith under this section.

History: 1995 a. 27; 1997 a. 101; 2001 a. 16, 91; 2003 a. 36, 138; 2005 a. 155 s. 70; Stats. 2005 s. 895.446; 2005 a. 447 s. 1; 2007 a. 96.

A trial court cannot, contrary to sub. (3) (b), award attorney fees that exceed what was actually "incurred." Stathus v. Horst, 2003 WI App 28, 260 Wis. 2d 166, 659 N.W.2d 165, 02–0543.

Under Wisconsin law the economic loss doctrine does not bar recovery under s. 100.18, but it does bar recovery under s. 895.80, at least under the facts of this case. Dow v. Poltzer, 364 F. Supp. 2d 931 (2005).

895.447 Certain agreements to limit or eliminate tort liability void. (1) Any provision to limit or eliminate tort liability as a part of or in connection with any contract, covenant or agreement relating to the construction, alteration, repair or maintenance of a building, structure, or other work related to construction, including any moving, demolition or excavation, is against public policy and void.

(2) This section does not apply to any insurance contract or worker's compensation plan.

(3) This section shall not apply to any provision of any contract, covenant or agreement entered into prior to July 1, 1978.

History: 1977 c. 441; Stats. 1977 s. 895.47; 1977 c. 447; Stats. 1977 s. 895.49; 2005 a. 155 s. 49; Stats. 2005 s. 895.447.

This section did not void an indemnity clause in a contract. Gerdmann v. U.S. Fire Insurance Co. 119 Wis. 2d 367, 350 N.W.2d 730 (Ct. App. 1984).

895.448 Safety devices on farm equipment, ordinary negligence. (1) In this section:

(a) "Farm equipment" means a tractor or other machine used in the business of farming.

(b) "Safety device" means a guard, shield or other part that has the purpose of preventing injury to humans.

(2) If a person in the business of selling or repairing farm equipment fabricates a safety device and installs the safety device on used farm equipment, after determining either that the farm equipment was not originally equipped with such a safety device or that a replacement is not available from the original manufacturer or from a manufacturer of replacements, and notifies the owner or purchaser of the farm equipment that the person fabricated the safety device, the person is not liable for claims founded in tort for damages arising from the safety device unless the claimant proves, by a preponderance of the evidence, that a cause of the claimant's harm was the failure to use reasonable care with respect to the design, fabrication, inspection, condition or installation of, or warnings relating to, the safety device.

History: 1993 a. 455; 2005 a. 155 s. 50; Stats. 2005 s. 895.448.

895.45 Service representatives for adult abusive conduct complainants. (1) DEFINITIONS. In this section:

(a) "Abusive conduct" means domestic abuse, as defined under s. 49.165 (1) (a), 813.12 (1) (am), or 968.075 (1) (a), harassment, as defined under s. 813.125 (1), sexual exploitation by a therapist under s. 940.22, sexual assault under s. 940.225, child abuse, as defined under s. 813.122 (1) (a), or child abuse under ss. 948.02 to 948.11.

(b) "Complainant" means an adult who alleges that he or she was the subject of abusive conduct or who alleges that a crime has been committed against him or her.

(c) "Service representative" means an individual member of an organization or victim assistance program who provides counseling or support services to complainants or petitioners and charges no fee for services provided to a complainant under sub. (2) or to a petitioner under s. 813.122.

(2) RIGHT TO BE PRESENT. A complainant has the right to select a service representative to attend, with the complainant, hearings, depositions and court proceedings, whether criminal or civil, and all interviews and meetings related to those hearings, depositions and court proceedings, if abusive conduct is alleged to have occurred against the complainant or if a crime is alleged to have been committed against the complainant and if the abusive conduct or the crime is a factor under s. 767.41 or is a factor in the complainant's ability to represent his or her interest at the hearing, deposition or court proceeding. The complainant shall notify the court orally, or in writing, of that selection. A service representative selected by a complainant has the right to be present at every hearing, deposition and court proceeding and all interviews and meetings related to those hearings, depositions and court proceedings that the complainant is required or authorized to attend. The service representative selected by the complainant has the right to sit adjacent to the complainant and confer orally and in writing with the complainant in a reasonable manner during every hearing, deposition or court proceeding and related interviews and meetings, except when the complainant is testifying or is represented by private counsel. The service representative may not sit at counsel table during a jury trial. The service representative may address the court if permitted to do so by the court.

(3) FAILURE TO EXERCISE RIGHT NOT GROUNDS FOR APPEAL. The failure of a complainant to exercise a right under this section is not a ground for an appeal of a judgment of conviction or for any court to reverse or modify a judgment of conviction.

History: 1991 a. 276; 1995 a. 220; 2001 a. 109; 2005 a. 155 s. 64; Stats. 2005 s. 895.45; 2005 a. 443 s. 265; 2007 a. 20.

895.455 Limits on recovery by prisoners. A prisoner, as defined in s. 801.02 (7) (a) 2., may not recover damages for mental or emotional injury unless the prisoner shows that he or she has suffered a physical injury as a result of the same incident that caused the mental or emotional injury.

History: 1997 a. 133; 2005 a. 155 s. 66; Stats. 2005 s. 895.455.

895.457 Limiting felon's right to damages. (1) In this section:

(a) "Crime" means a crime under the laws of this state or under federal law.

(b) "Damages" means damages for an injury to real or personal property, for death, or for personal injury.

(c) "Felony" means a felony under the laws of this state or under federal law.

(d) "Victim" means a person against whom an act constituting a felony was committed.

(2) No person may recover damages from any of the following persons for injury or death incurred while committing, or as a result of committing, an act that constituted a felony, if the person was convicted of a felony for that act:

(a) A victim of that felony.

(b) An individual other than a victim of that felony who assisted or attempted to assist in the prevention of the act, who assisted or attempted to assist in the protection of the victim, or who assisted or attempted to assist in the apprehension or detention of the person committing the act unless the individual who assisted or attempted to assist is convicted of a crime as a result of his or her assistance or attempted assistance.

(3) This section does not prohibit a person from recovering damages for death or personal injury resulting from a device used to provide security that is intended or likely to cause great bodily harm, as defined in s. 939.22 (14), or death.

(4) (a) Any applicable statute of limitations for an action to recover damages against a person described under sub. (2) (a) or (b) for injury or death incurred while committing, or as a result of committing, an act that constituted a felony is tolled during the period beginning with the commencement of a criminal proceeding charging the person who committed the act with a felony for that act and ending with the final disposition, as defined in s. 893.13 (1), of the criminal proceeding.

(b) Any applicable statute of limitations for an action to recover damages from an individual described under sub. (2) (b) for injury or death incurred while committing, or as a result of